[redacted]

QUESTIONS PRESENTED

1. Where the Federal Deposit Insurance Corporation (FDIC) purchases assets from the receiver of an insolvent bank, pursuant to 12 U.S.C. 1823(e), in order to facilitate a purchase and assumption by another insured bank, whether the FDIC is shielded from claims of state and common law fraud based on actions of persons other than the FDIC in connection with the purchased assets.

2. Whether the explicit protections of 15 U.S.C. 78cc(c) for the purchaser of a debt in good faith for value without actual knowledge of a violation apply when the FDIC is both the purchaser of a note and the receiver of the insolvent bank.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Black v. *FDIC*, 640 F.2d 699	11
Clearfield Trust Co. v. *United States*, 318 U.S. 363	7
D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447	7
FDIC v. *Ashley*, 585 F.2d 157	12
FDIC v. *First Southern Trust Co.*, Nos. 80-1139, 80-1367 (6th Cir. Jan. 13, 1982)	9
FDIC v. *Glickman*, 450 F.2d 416	12
FDIC v. *Godshall*, 558 F.2d 220	12
FDIC v. *Lattimore Land Corp.*, 656 F.2d 139	10
FDIC v. *Meo*, 505 F.2d 790	10
FDIC v. *Waldron*, 630 F.2d 239	11
Freeling v. *Sebring*, 296 F.2d 244	10, 12
Gilman v. *FDIC*, 660 F.2d 688	8, 9, 12
Globus v. *Law Research Service, Inc.*, 418 F.2d 1276, cert. denied, 397 U.S. 913	12
Tcherepnin v. *Knight*, 389 U.S. 332	12
Tullis v. *Kohlmeyer & Co.*, 551 F.2d 632	12
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715	6, 7, 8

Statutes and regulation:

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:	
Section 29(b), 15 U.S.C. 78cc(b)	9
Section 29(c), 15 U.S.C. 78cc(c)	6, 9, 11, 12
12 U.S.C. 1819	10
12 U.S.C. 1821(c)	3, 11

Statutes and regulation—Continued

	Page
12 U.S.C. 1821(e)	3, 11
12 U.S.C. 1823(d)	11
12 U.S.C. 1823(e)	2, 3, 5, 6, 7, 8, 11
28 U.S.C. 1292(b)	6
12 C.F.R. 221.1(a)	9

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2114

WILLIAM L. GUNTER and CAMILLE S. GUNTER,
PETITIONERS

v.

THEODORE M. HUTCHESON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A82-A139) is reported at 674 F.2d 862. The opinion of the district court (Pet. App. A1-A59) is reported at 492 F. Supp. 546.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1982. The petition for a writ of certiorari was filed on May 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC) is a federal agency devoted to promoting stability and confidence in banking (see Pet. App. A106). Its principal means of accomplishing that end is by insuring bank deposits. When an FDIC-insured bank is closed by its chartering authority the FDIC must act quickly to meet its statutorily mandated responsibility to protect depositors and to promote public confidence in banking. One option is for the FDIC simply to pay the insurance on deposits. The failed bank's receiver, often the FDIC itself acting in a distinct capacity from that of insurer, then liquidates the assets of the bank and pays ratable distributions over time to the bank's creditors. This procedure, however, which is sometimes referred to as a "payoff," has several disadvantages.[1]

The FDIC also has an alternative method of dealing with a bank failure, a purchase and assumption transaction, which does not have the disadvantages of a payoff. Pursuant to 12 U.S.C. 1823(e), the FDIC, in its corporate capacity, may purchase assets of a closed insured bank in order to facilitate the assumption of the liabilities of the failed bank by another insured bank (the "assuming bank"). Gen-

[1] For example, all time, demand, and savings deposits are frozen, and all checks drawn on the closed bank's accounts are returned unpaid. Bank depositors are left without access to their funds on deposit during the time it takes the FDIC to determine the amount of insurance owed each depositor and to prepare the checks representing insurance payments. Moreover, depositors with deposits exceeding the insured limit of $100,000 and other creditors must await the liquidation of the bank's assets by the receiver and the payment of pro rata dividends. Often, such creditors will wait years for payment of their claims. See Pet. App. A83-A84.

erally, under this procedure, the assuming bank is able to open the doors of the failed bank on the next business day, thus preventing any loss to depositors and interruption of vital banking services. In addition, the assuming bank pays a premium for the right to participate in the transaction, which permits the failed bank's receiver to realize upon the "going concern" value of the bank—an asset that is lost in a payoff. See Pet. App. A84-A85.

The mechanics of the purchase and assumption transaction work essentially as follows: As soon as the receiver of the insolvent bank, which is usually the FDIC itself,[2] is appointed, it calls upon existing banks or other qualified buyers to submit bids for the purchase of certain of the insolvent bank's assets and the assumption of its deposit liabilities. Upon receipt of the bid, the FDIC's Board of Directors makes a cost determination as to whether the FDIC can effect the purchase and assumption transaction. Under the terms of the statute, the FDIC may effect a purchase and assumption transaction only when, in the judgment of its Board of Directors, "such action will reduce the risk or avert a threatened loss to the Corporation * * *." 12 U.S.C. 1823(e). If the FDIC accepts a bid, the new bank agrees with the receiver, subject to court approval, to assume all deposit liabilities and to purchase certain assets of the failed bank. Initially, the assuming bank is required to purchase only those assets that are believed to be of the highest banking quality, and the amount of deposit liabilities accordingly is greater than the value of the

---

[2] In most closings, the FDIC is appointed receiver by the appropriate banking authority. The FDIC is required to accept appointment as receiver if tendered. 12 U.S.C. 1821(c), (e). See Pet. App. A85.

assets purchased by the assuming bank. The receiver then agrees to pay in cash to the assuming bank an amount sufficient to make the assets it receives equal to the liabilities it assumes.

To raise the necessary cash, the FDIC, in its corporate capacity, purchases from the receiver all remaining assets that were not acquired by the assuming bank. As consideration, the FDIC pays to the receiver in cash from its insurance fund the difference between the value of the assets acquired by the assuming bank and the amount of deposit liabilities, less a credit for the amount of the premium bid by the assuming bank for the "going concern" value of the failed bank. The receiver then transfers the cash to the assuming bank. In order to provide maximum protection to depositors, to lessen the potential adverse impact of a bank closing on the community, and to preserve the "going concern" value of the bank as an asset, it is important that the FDIC be able to consummate this transaction as quickly as possible. See generally Pet. App. A85-A87.

2. In December 1974, petitioners borrowed $5.5 million from the Hamilton National Bank of Chattanooga, Tennessee ("HNB"). The debt was evidenced by two promissory notes executed by petitioners. The loan proceeds were used to finance petitioners' purchase of 61% of the stock of the Hamilton Bank and Trust Company of Atlanta, Georgia ("HB&T") (Pet. App. A87-A88).

After the close of business on February 16, 1976, HNB was declared insolvent, and the FDIC was appointed as its receiver. As receiver, the FDIC took possession of the books, records, premises, and affairs of HNB, and it solicited bids from other banks in an attempt to effect a purchase and assumption transaction.

The highest acceptable bid was submitted by First Tennessee National Bank, which agreed to pay a premium of $16,251,000 in order to acquire certain of HNB's assets, to assume its deposit liabilities, and to reopen all of its offices on February 17, 1976, under the First Tennessee name. The FDIC's Board of Directors made the cost determination required by 12 U.S.C. 1823(e) and approved the purchase and assumption transaction with First Tennessee. Among the assets of HNB acquired by First Tennessee pursuant to this transaction were the two promissory notes executed by petitioners. Under the terms of the transaction, First Tennessee was given the right to return to the receiver certain categories of loans, in exchange for payment of the outstanding principal amounts of those loans. In order to fund this obligation on the part of the receiver, the FDIC in its corporate capacity agreed to repurchase these returned loans from the receiver for an amount equal to that paid by the receiver to First Tennessee.

Petitioners' note for $3 million was among those loans returned by First Tennessee to the receiver on March 17, 1976, pursuant to this provision. The receiver immediately sold this note to the FDIC in its corporate capacity for $3,220,794.50, which amount was paid from the FDIC's deposit insurance fund (Pet. App. A5-A7, A88-A89).

3. In October 1976, the HB&T in Atlanta also became insolvent. Soon thereafter, petitioners then filed suit against a number of former directors and officers of HNB, seeking damages and rescission of the two promissory notes based on violations of federal and state securities laws and common law. The basis for their suit was that HNB had fraudulently induced them to purchase stock in the Atlanta HB&T, by agreeing to perform certain future actions and by

misrepresenting the financial quality of petitioners' investment. Petitioners later amended their complaint to include the FDIC as a party defendant because the FDIC had purchased the $3 million promissory note. As to the FDIC, petitioners sought only rescission. The FDIC counterclaimed for payment of its note, and, as a defense to this counterclaim, petitioners asserted the same allegations of fraud that constituted their affirmative claim for rescission.

On July 18, 1979, the FDIC moved for summary judgment on both petitioners' claim for rescission and its counterclaim. For the purposes of that motion, the FDIC assumed that petitioners had been defrauded by HNB, but claimed that, under federal law, petitioners' claims could not be asserted against the FDIC. See Pet. App. A89-A90. The district court granted the FDIC's motion for summary judgment, finding that federal law did indeed protect the FDIC from assertions of fraud by obligors on assets purchased from a failed bank pursuant to 12 U.S.C. 1823(e), when the purchase was in good faith, for value, and without actual knowledge of the fraud (Pet. App. A1-A59). After the district court certified the decision for interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. A72-A79), the court of appeals affirmed (*id.* at A82-A139). Following the analysis set forth by this Court in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), the court held that federal common law shielded the FDIC from the state and common law fraud claims (Pet. App. A95-A121). The court also held that Section 29(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78cc(c), explicitly insulated the FDIC from the federal securities law fraud claims (Pet. App. A121-A130).

ARGUMENT

1. Petitioners contend (Pet. 11-22) that the court of appeals erred in holding that federal common law immunized the FDIC from state and common law fraud suits in connection with assets acquired to facilitate a purchase and assumption transaction. As the court of appeals explained in a detailed opinion upon which we rely, this contention is without merit.

a. There can be little doubt that the FDIC's authority derives from a "constitutional function or power" and that the overriding federal interest implicated by the exercise of its statutory responsibilities requires a rule of federal law. See *United States* v. *Kimbell Foods, Inc.*, *supra*, 440 U.S. at 726-727; *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943). Indeed, this Court has specifically recognized that federal law controls the rights and obligations of the FDIC. *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). See Pet. App. A101-A102.

Moreover, as the court of appeals explained (Pet. App. A102-A116), examination of the relevant factors set forth by this Court in *Kimbell Foods* (440 U.S. at 728-729) establishes the need for a uniform federal rule of law immunizing the FDIC from fraud suits concerning assets obtained in connection with a purchase and assumption transaction. In order to be effective, a purchase and assumption must be consummated quickly; requiring the FDIC to consider the impact of various state laws on the rights involved would impair its ability to act with the necessary speed. Most important, Section 1823(e) requires the FDIC to make a judgment whether a purchase and assumption transaction "will reduce the

risk or avert a threatened loss to the Corporation." It is impossible to make this judgment in the limited time available if the FDIC's right to collect on assets returned by the purchasing bank is subject to potential fraud claims of which the FDIC lacks knowledge. Unless the FDIC is insulated from such claims, it will be foreclosed from implementing purchase and assumption transactions, which is the option that best promotes stability and confidence in the nation's banking system (see pages 2-3, *supra*). Thus, the federal common law rule applied by the court of appeals is a necessary complement to the FDIC's statutory mandate, and a contrary rule would "frustrate [the] specific objectives" (*United States* v. *Kimbell Foods, Inc.*, *supra*, 440 U.S. at 728) of 12 U.S.C. 1823(e). See Pet. App. A103-A107. Finally, the rule applied by the court of appeals does not significantly interfere with commercial expectations; the FDIC is placed in the same position as a holder in due course of the note, and petitioners retain the right to proceed with their fraud action against the officers and directors of HNB, the alleged perpetrators of the fraud.

b. Petitioners contend (Pet. 11-16) that the Court should grant review here because different courts of appeals have reached "divergent results" on this issue. This contention is wholly without merit. The decisions cited by petitioner are all consistent with the decision below; indeed, some of them have specifically approved the instant case.

Gilman v. *FDIC*, 660 F.2d 688 (6th Cir. 1981), upon which petitioners rely (Pet. 11), arose out of the same bank failure involved in the instant case. After the FDIC had agreed to repurchase the assets refused by the assuming bank, but before re-

purchase of a particular note was demanded, the debtor notified the FDIC that he was entitled to rescind the note under 15 U.S.C. 78cc(b) because the loan was made in violation of Regulation U, 12 C.F.R. 221.1(a). The court held that the alleged violation was not a defense to the FDIC's demand for payment of the note because the FDIC did not have "actual knowledge" (see 15 U.S.C. 78cc(c)) of the violation at the time it irrevocably committed itself to repurchase any assets refused by the assuming bank. Citing the district court decision in the instant case with approval, the court found that the time of repurchase was the critical time because otherwise "the FDIC as insurer would be placed in an untenable position." 660 F.2d at 695. The court explained (*ibid.*):

> To hold the FDIC responsible retroactively for the misdeeds of its predecessors of which it is ignorant when it agrees to repurchase all returned assets would hamper the FDIC's ability and inclination to opt for a Purchase and Assumption arrangement. The FDIC would never be able to enter one with a clear assessment of the amount of worthless paper and litigation it might face. This dilemma would, in turn, frustrate the public policies behind the scheme of national banking insurance.

The Sixth Circuit subsequently indicated its approval of the decision below again, remanding for reconsideration in light of *Gilman* and the instant case a district court decision declining to find the FDIC immune from a fraud claim in connection with another note purchased by the FDIC in the course of the purchase and assumption of HNB. *FDIC* v. *First Southern Trust Co.*, Nos. 80-1139, 80-1367 (Jan. 13, 1982).

Petitioners do point to one case in which a debtor was permitted to raise a claim of failure of consideration in defense to a suit by the FDIC as a *receiver* of a failed bank. *FDIC* v. *Meo*, 505 F.2d 790 (9th Cir. 1974). As the court of appeals explained (Pet. App. A136 n.15), however, *Meo* involves completely different considerations than the instant case. *Meo* concerned the federal policy estopping debtors from raising defenses when they have lent themselves to the creation of deceptive assets on the books and records of a bank insured by the FDIC. Here, the rule shielding the FDIC from fraud claims is necessary to enable the FDIC to make the expeditious cost calculation that is a prerequisite to a purchase and assumption transaction. The rule is critical to the FDIC's discharge of its statutory responsibility as insurer. These considerations are wholly absent when the FDIC simply acts as receiver of a failed bank.[3] No comparable federal policy requires that a debtor who is wholly "innocent of any wrongdoing or negligence" (505 F.2d at 793) be unable to assert against the receiver, even if it is the FDIC, the defenses that he could have asserted against the bank. Plainly, *Meo* in no way conflicts with the decision below.[4]

---

[3] Congress has specifically noted in a related context the important difference between the FDIC acting in its corporate capacity and acting as a receiver. A case in which the FDIC is a party in its capacity as receiver is excepted from the general statutory rule specifying that cases in which the FDIC is a party "arise under the laws of the United States." 12 U.S.C. 1819; see *Freeling* v. *Sebring*, 296 F.2d 244, 245 (10th Cir. 1961). By the same token, the need for a uniform federal rule of law regarding the FDIC acting as receiver is also less strong.

[4] The other cases cited by petitioners are completely inapposite. In *FDIC* v. *Lattimore Land Corp.*, 656 F.2d 139

2. Petitioners also contend (Pet. 22-26) that the court of appeals erred in holding the FDIC immune, based on the explicit terms of 15 U.S.C. 78cc(c), from petitioners' claims of securities fraud. Their primary contention is that the FDIC is not permitted to invoke the good faith purchaser protection of the federal statute because the FDIC acted in a dual capacity and purchased the note in its corporate capacity from itself acting as receiver.[5] This contention is without foundation.

The FDIC is required by statute to accept appointment as receiver of a failed bank. 12 U.S.C. 1821(c), (e). And it is specifically authorized by statute to deal with itself as the receiver of a failed bank. 12 U.S.C. 1823(d), (e). Once the FDIC was asked to take over as receiver of HNB here, there was no way for it to consummate a purchase and assumption transaction without dealing with itself

---

(5th Cir. 1981), the court did not reach the issue presented here because it found that there was no valid claim of fraud under state law on the facts there. *Id.* at 145-146. Moreover, the court in dictum noted approvingly the district court decision in the instant case. *Id.* at 146 n.13. Neither *Black* v. *FDIC*, 640 F.2d 699 (5th Cir. 1981), nor *FDIC* v. *Waldron*, 630 F.2d 239 (4th Cir. 1980), involved the assertion of a fraud claim against the FDIC. In both cases, the debtors relied on certain oral agreements allegedly made by the original lenders, and, based on the express terms of 12 U.S.C. 1823(e), the courts concluded that the agreements were not valid against the FDIC.

[5] Petitioners' suggestion (Pet. 17-20) that the policies of the federal securities statutes are undermined by petitioners' inability to pursue claims of securities fraud against the FDIC is frivolous. The FDIC's immunity from these claims was not created by the courts; it is based on a specific provision in the very federal statutes whose "policies" petitioners seek to invoke.

as receiver. Thus, the fact that the FDIC purchased petitioners' note from itself as receiver provides no basis for concluding that the purchase, which was for a sum in excess of $3 million, was not a good faith transaction. Other courts have recognized the propriety of the FDIC's acting in such a dual capacity and have specifically held that the protections of 15 U.S.C. 78cc(c) apply when the FDIC, acting in its corporate capacity, purchases a note from itself acting as receiver. *Gilman* v. *FDIC*, *supra*, 660 F.2d at 695 n.11. See also *FDIC* v. *Ashley*, 585 F.2d 157 (6th Cir. 1978); *FDIC* v. *Godshall*, 558 F.2d 220 (4th Cir. 1977); *FDIC* v. *Glickman*, 450 F.2d 416, 418 (9th Cir. 1971); *Freeling* v. *Sebring*, 296 F.2d 244 (10th Cir. 1961).[6]

---

[6] Petitioners' contention (Pet. 25-26) that the protections of Section 29(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78cc(c), do not apply to their claims under the 1933 Act was correctly rejected by the court of appeals. See Pet. App. A127-A130. The courts have long recognized that the 1934 Act and 1933 Act are to be read *in pari materia*, and there can be little doubt that, at least here, where the claims under both Acts are fraudulent misrepresentation claims of the same character arising out of the same conduct brought against a federal banking agency, the good faith purchaser protection applies under both statutes. See, *e.g.*, *Tullis* v. *Kohlmeyer & Co.*, 551 F.2d 632, 634-638 (5th Cir. 1977); *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276, 1286-1287 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970); see generally *Tcherepnin* v. *Knight*, 389 U.S. 332, 342, 344 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

THOMAS A. BROOKS
General Counsel

ALBERT J. TUMPSON
Attorney
Federal Deposit Insurance Corporation

JULY 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 370322 1030